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Nos. 87-1904 and 87-7028

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Cross-Petitions for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit

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BRIEF AS AMICUS CURIAE FOR THE UNITED STATES SENTENCING COMMISSION

JOHN R. STEER
General Counsel
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-8800

PAUL M. BATOR *
ANDREW L. FREY
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

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QUESTION PRESENTED

Whether the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984 are invalid because the Act unconstitutionally delegates legislative power, violates separation of powers principles, or deprives criminal defendants of due process of law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF THE AMICUS CURIAE

This case involves a challenge to the constitutionality of the Sentencing Reform Act of 1984, which created the United States Sentencing Commission as "an independ-

ent commission in the judicial branch of the United States" (28 U.S.C. § 991(a)) and authorized the Commission to "establish sentencing policies and practices for the Federal criminal justice system" (28 U.S.C. § 991(b)). Pursuant to that statutory mandate, the Commission has issued detailed guidelines prescribing the appropriate range of sentences for offenders convicted of federal crimes. These guidelines, which were submitted to Congress on April 13, 1987, took effect on November 1, 1987. Pub. L. No. 98-473, § 235, 98 Stat. 2031.

The Commission has a direct and substantial interest in defending the constitutionality of the statute that created it and the validity of the sentencing guidelines that it produced. In fact, in the numerous recent cases in the lower courts challenging the validity of the Act and the guidelines, *only the Commission has defended the constitutionality of the Sentencing Reform Act as enacted by Congress*, because the Department of Justice agreed with the defendants that Congress could not validly assign the function of formulating sentencing guidelines to an agency in the judicial branch. Therefore, the Commission has, with the consent of the Department of Justice, participated fully, by brief and argument, in virtually all of these cases. The Commission's participation is essential in this Court as well, if the Court is to be assured of a complete exposition of the legal issues in this case.[1]

DISCUSSION

The United States Sentencing Commission strongly concurs in the Department of Justice's submission that the Court should grant prompt review in this case to resolve the constitutional challenges to the Sentencing Reform Act of 1984. See Appendix, *infra* (Letter from

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[1] The Solicitor General and counsel for the defendant have consented to *amicus curiae* participation by the Sentencing Commission in this case.

Chairman Wilkins to Solicitor General Fried, dated March 1, 1988). There is widespread disagreement in the lower courts on the issue of constitutionality, and the questions are of surpassing public importance. It is inevitable, therefore, that this Court will eventually have to resolve these questions. There is nothing to be gained by delaying that resolution: the statute has been attacked on its face, so there is no need to await further factual developments or to monitor experience under the sentencing guidelines; and the legal issues have been fully explored by numerous district courts and are likely to produce several court of appeals decisions prior to the time that this case could be heard.

On the other hand, postponing a final decision on the constitutionality of the Act would have severe adverse effects. Because the Act governs offenses committed after November 1, 1987, the sentencing guidelines ultimately will apply to more than 90% of all criminal cases in the federal courts (see *Federal Sentencing Guidelines Manual* 12 (Feb. 1988))—approximately 40,000 cases each year. Courts handling these cases currently confront a debilitating uncertainty. Defendants similarly situated in every material respect will be sentenced under different regimes and may receive widely disparate sentences, as some judges apply the sentencing guidelines while others follow the pre-guidelines approach. Defendants are being sentenced by some judges under a system that other judges have deemed unconstitutional. Thousands of defendants whose sentences eventually are determined to be illegal will have to be resentenced. The integrity and credibility of the criminal justice system will be severely compromised if the existing chaotic uncertainty and inequality are prolonged.

The cloud on the Sentencing Reform Act also impairs the functioning of the Sentencing Commission. The Sentencing Reform Act empowers the Commission "periodically [to] review and revise" the sentencing guidelines

"in consideration of comments and data coming to its attention" (28 U.S.C. § 994(*o*)). The Commission is under a continuing obligation to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress on amendments of the guidelines (28 U.S.C. § 994(p)), periodically inform Congress whether the grades or maximum penalties of specified offenses should be modified (28 U.S.C. § 994(r)), monitor and analyze the operation of the guidelines (28 U.S.C. § 994(w)),[2] issue general policy statements regarding application of the guidelines (28 U.S.C. § 994(a)(2)), and carry out a host of additional responsibilities. See 28 U.S.C. § 995. The performance of these duties is necessarily handicapped when the delegation of authority to and the composition of the Commission are under repeated attack in the lower courts.

The importance of resolving the constitutional doubts about the sentencing guidelines is magnified by the fact that the Department of Justice, while concluding that the guidelines should be upheld, has agreed with the defendants that some portions of the Sentencing Reform Act are unconstitutional. Specifically, the Department has argued in the lower courts that Congress violated principles of separation of powers by creating the Sentencing Commission as an independent commission in the judicial branch. In the Department's view, the power to issue binding rules governing sentencing is exclusively an "executive" function that Congress may not delegate to the judicial branch. The Department's position in the lower courts has been that the Act's constitutional "de-

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[2] This monitoring function has been particularly frustrated because it is dependent upon the Commission's receipt from sentencing courts of a report on each sentence imposed for a non-petty offense. The constitutional challenges to the Act have led many courts either to delay in submitting the statutorily-mandated reports or to decline to submit the reports entirely.

fects" may be remedied simply by "judicially characteriz[ing]" the Commission "as having Executive Branch status" (87-1904 Pet. App. 4a) and by severing the phrase "in the judicial branch" from 28 U.S.C. § 991 (a).[3]

The Commission's position is, in contrast, that Congress acted entirely within the letter and spirit of the Constitution—as well as with eminent good sense—when it created an independent body in the judicial branch to perform the very special sort of activity involved in the creation of rules, under congressional standards, to order and rationalize the preexisting (virtually unfettered) sentencing discretion of federal judges; when it determined to delegate to a specialized commission, rather than to undertake itself, the massive task of collecting and analyzing data on historic sentencing practices and converting them into detailed guidelines for the future; when it created a diverse Commission that could include a variety of fields of experience but that would also draw on the expertise and disinterested judgment of the federal judiciary; when it decided to give the President a limited power to remove commissioners "only for neglect of duty or malfeasance in office or for other good cause shown" (28 U.S.C. § 991(a)); when it specified that the Commission should be "independent," so that the sensitive functions it performs will be, and will be seen to be, free from undue influence by prosecutorial (or defense) interests; and when it underlined that independence by locating the Commission in the judicial branch, thereby reaffirming that the creation of sentencing guidelines is in aid of a central judicial function.

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[3] The Department's view was adopted by the district court in this case. See 87-1904 Pet. App. 4a-5a. Most of the other decisions cited in the petition as having upheld the "guidelines sentencing system" have adopted the Sentencing Commission's view that the Sentencing Reform Act is constitutional in its entirety.

Defending the Sentencing Reform Act as Congress wrote it is a matter of significant public moment. As the Department of Justice has observed (87-1904 Pet. 9), the Act "was the product of a decade-long effort to reform the sentencing process in federal criminal cases in order to promote the purposes of punishment while eliminating unjustified disparities in the sentences imposed on convicted defendants." Dissatisfaction with the lack of uniformity in federal sentencing actually dates back at least to 1958, when Congress, adopting a recommendation of the Judicial Conference of the United States, authorized the creation of sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing" "[i]n the interest of uniformity in sentencing procedures." Pub. L. 85-752, 72 Stat. 845 (1958), 28 U.S.C. § 334(a) (1964). The 1958 legislation reflected Congress's concern with "the existence of widespread disparities in the sentences imposed by Federal courts * * * in different parts of the country, between adjoining districts, and even in the same district." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958).

In the early 1970's a prolonged bipartisan effort began to restudy and reform the federal criminal law, including the federal sentencing system. Four different administrations have participated in that effort. The specific bill that became the Sentencing Reform Act was introduced by Senator Edward Kennedy, was cosponsored by leading members from a broad cross-section of each party (see S. Rep. No. 98-225, 98th Cong., 2d Sess. 37 & n.3 (1984)), received the strong endorsement of the Reagan Administration, and was adopted by overwhelming bipartisan majorities of both the Senate and the House of Representatives as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837. Attorney General William French Smith described the Sentencing Reform Act as "a totally new and com-

prehensive sentencing reform that is based on a coherent philosophy" (S. Rep. No. 98-225, *supra*, at 38) and as "the most far-reaching, substantial reform of the criminal justice system ever enacted by Congress," *Introduction*, 32 Fed. B. News & J. 60 (1985), while Senator Kennedy described the Act as "a comprehensive and far-reaching new approach for the federal law of sentencing [designed] to reduce the unacceptable disparity of punishment that plagues the federal system, and * * * to assure sentences that are fair—and perceived to be fair—to offenders, victims, and society." *The Sentencing Reform Act of 1984*, 32 Fed. B. News & J. 62, 65 (1985).

The Sentencing Reform Act thus comes to this Court as the product of an extraordinary, prolonged, bipartisan consensus. It was not the creation of ill-considered political whim or passing partisan passions. The Act reflects a massive inter-branch commitment to the creation of a new system of sentencing that will constitute a major improvement in the administration of justice.

The Sentencing Commission believes it is essential that constitutional challenges to Congress's landmark legislation be quickly resolved so that the uncertainties surrounding current sentencing practices may be eliminated and the important societal benefits resulting from a consistent and rational system of sentencing guidelines may be achieved. It hopes to participate fully in this litigation so that the substantial arguments in favor of the validity of the Sentencing Reform Act as Congress enacted it may be heard and considered by this Court.

CONCLUSION

The petitions for a writ of certiorari before judgment should be granted.

Respectfully submitted.

JOHN R. STEER
General Counsel
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-8800

PAUL M. BATOR *
ANDREW L. FREY
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

MAY 1988

APPENDIX

THE UNITED STATES SENTENCING COMMISSION
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004
(202) 662-8800

[SEAL]

March 1, 1988

Honorable Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Fried:

At its meeting today, the Commission unanimously voted to request and support an effort by the Department of Justice to obtain an expeditious decision by the United States Supreme Court on the constitutionality of the Sentencing Reform Act and the sentencing guidelines promulgated by the Commission.

The growing number of constitutional challenges (in excess of fifty filed to date, with conflicting decisions in some half dozen cases) across the country argues strongly for this approach. These same issues will continue to be presented in criminal cases involving post-November 1, 1987, conduct, making it likely that almost every federal district judge will soon be asked to rule on similar challenges. It can be expected that some judges will uphold the guidelines and sentence accordingly; others, including several who have already ruled the guidelines invalid, will sentence based on pre-November 1 law; still others who invalidate the Commission's guideline promulgation authority may impose determinate sentences under the new law without regard to the guidelines.

The impact on all facets of the criminal justice system of this situation constitutes a compelling case for invoking extraordinary procedures to obtain a decision from the United States Supreme Court as early as practicable.

We welcome the opportunity to further discuss this important matter with you and look forward to working with the Department to achieve a prompt and favorable result.

Sincerely,

/s/ Billy Wilkins
WILLIAM W. WILKINS, JR.
Chairman